Prosecuting Attorneys' Council of Georgia

State Prosecution Support Division

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JUNE 15, 2015



# *State v. Frost*

***The Supreme Court holds that the interpretation of O.C.G.A. § 24-4-417 by the Court of Appeals was too restrictive and that evidence of prior DUI refusals was relevant and admissible to prove knowledge under the statute***

In *State v. Frost*, S14G1767 (June 15, 2015), the trial court permitted the State under O.C.G.A. § 24-4-417 to present evidence at trial that Frost had driven under the influence of alcohol on two prior occasions and refused state-administered testing. The Court of Appeals disagreed with the trial court, finding that the evidence was not relevant to prove knowledge. *Frost v. State*, 328 Ga.App. 337, 342-344 (2) (2014). Relying on Professor Milich's opinion, the Court of Appeals found that Rule 417 was adopted to address only one "specific situation": "[A] case in which the accused refused a state-administered test required by O.C.G.A. § 40-5-55, *and* in which the accused offers evidence at trial to suggest that his refusal is attributable to a lack of knowledge, misunderstanding, inadvertence, accident, or mistake, *and* in which the State has evidence not only that the accused has driven under the influence on other occasions, but also that the accused on those same occasions actually was asked to submit and did submit to a state administered test, *and* in which the State offers that evidence of driving under the influence on other occasions to rebut the suggestion of the accused by showing that his refusal in the present case was not, in fact, owing to a lack of knowledge, misunderstanding, inadvertence, accident, or mistake." (Emphasis in original). The Supreme Court granted the State's petition for writ of certiorari and reversed.

The Supreme Court found that in a DUI prosecution, evidence of other DUIs may be admitted by way of two sections of the new Evidence Code: Rule 417 and Rule 404 (b). And just as it did under Rule 404 (b) in *Jones v. State*, 326 Ga.App. 658 (2014) (*Jones I*) rev'd by *State v. Jones*, ___ Ga. ___ (2) (Case No. S14G1061, decided June 1, 2015) (*Jones II*), the Court of Appeals in this case took too narrow a view of Rule 417. Thus, the Court noted, although Rule 417 may have a far more limited application than Rule 404 (b), nevertheless, it too was a "rule of inclusion."

Therefore, the Court found, the "specific situation" that Rule 417 (a) (1) was enacted to address is precisely that situation identified explicitly in the text of Rule 417 (a) (1): a case in which "[t]he accused refused . . . to take the state administered test required by Code Section 40-5-55." Regardless of whether a defendant disputes the reasons for his refusal, such a situation presents special problems of proof for the prosecution. When an accused refuses the required test, his refusal generally is admissible, and a trier of fact may infer from such a refusal that, if the accused had submitted to the test, it would have shown some presence of an intoxicant. Such an inference, however, is permissive, not mandatory, and even in the absence of any evidence from the accused to explain or excuse his refusal, the trier of fact may decline to draw any infer-

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ence at all. If the trier of fact elects to draw the inference, its weight is indeterminate and left to the discretion of the trier of fact.

Consequently, the Court stated, proof that the accused on prior occasions had driven under the influence of the same or a similar intoxicant may strengthen substantially the inference about the presence of an intoxicant. First, it might properly be inferred from evidence of prior occasions on which the defendant had driven under the influence that the accused had awareness that his ingestion of an intoxicant impaired his ability to drive safely. Such awareness, in turn, would offer an explanation for why the defendant refused the test on this occasion, namely, that he was conscious of his guilt and knew that the test results likely would tend to show that he was, in fact, under the influence of a prohibited substance to an extent forbidden by O.C.G.A. § 40-6-391(a). Second, prior DUIs also could permit an inference in some circumstances that the defendant had acquired knowledge about the means by which law enforcement officers determine whether and to what extent a driver is under the influence of an intoxicant, and such awareness likewise might help to explain a refusal in the present case to submit to a test. In either event, the trier of fact might well conclude that an adverse inference about the presence of an intoxicant is more warranted than it otherwise would be, and the trier of fact might decide that the inference can bear more weight than it otherwise could. This is true when the accused refused the required tests on the prior occasions, and it is true even when the accused offers no evidence to explain or excuse his refusal on this occasion. Accordingly, the Court concluded, the trial court did not abuse its discretion when it found that the evidence that Frost had driven under the influence on two prior occasions was "relevant to prove knowledge" and therefore, would be admissible under Rule 417 (a) (1).

In so holding, the Court noted that the Court of Appeals also relied on *Jones I* and held that the same evidence would not be admissible under Rule 404 (b) either. Since the Court concluded that this evidence is admissible under Rule 417, it was not necessary to consider whether it also might be admitted under Rule 404 (b). But, the Court stated, "[G]iven its reliance on *Jones I*, the Rule 404 (b) analysis of the Court of Appeals in this case is not sound." The Court also "left for another day" any question about the extent to which Rule 403 applies to Rule 417.



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